UNITED STATES DISTRICT COURT

SIGNED 12/22/97

DISTRICT OF MAINE

UNITED STATES OF AMERICA v. ALBERTO GONZALEZ, Defendant	Criminal Nos. 96-29-P-C (Civil No. 97-130-P-C)

ORDER AFFIRMING IN PART THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge has filed with the Court on September 12, 1997, with copies to counsel, his Recommended Decision on Defendant's Motion for Collateral Relief Under 28 U.S.C. § 2255 (Docket No. 25 in Criminal No. 96-29-P-C); and, an extension of time having been granted, Defendant has filed his objection thereto on November 12, 1997 (Docket No. 27 in Criminal No. 96-29-P-C). This Court has reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record.

A. <u>Involuntariness of Defendant's Plea</u>

The Magistrate Judge concluded in respect to Defendant's assertion that his plea was involuntary that the claim is belied by the record of the colloquy between Defendant and the Court. Recommended Decision (Docket No. 25) at 3. He went on to find specifically that "[t]he defendant affirmatively indicated that he understood his conviction on the cocaine charge

subjected him to a minimum of 20 years' incarceration and up to life imprisonment, in addition to a possible fine and [term of] supervised release." *Id*.; Transcript of Rule 11 Inquiry, etc. (Docket No. 19) at 22. He found that "[s]imilarly, the defendant stated that he understood that the heroin charge subjected him to incarceration of up to 30 years in addition to a possible fine and [term of] supervised release." *Id*. He noted that Defendant acknowledged that he clearly understood his exposure to both those sentencing limits and that they had been fully explained to him by his attorney. *Id*. Finally, the Magistrate Judge concluded that "[i]n these circumstances, the court can reach no other conclusion than that the defendant's plea was knowing and voluntary." *Id*.

These findings are clearly correct as this Court's *de novo* review of the record in this matter clearly establishes. The resulting conclusion is manifestly correct. This Court will accept and affirm the Magistrate Judge's Recommended Decision in these respects.

B. Ineffective Assistance of Counsel

1. General

The Magistrate Judge notes three distinct claims of ineffective assistance of counsel: (1) that his attorney told the Defendant that he would receive a sentence of no more than twelve years and seven months in prison, *id*. at 4; (2) "that his attorney failed to pursue a direct appeal despite being instructed to do so," *id*. at 5; and (3) "that his attorney failed to object to the cocaine charge on the ground that the defendant possessed cocaine base rather than crack cocaine . . . ." *Id*. at 4.

2. Attorney's Failure to Object on Basis of a Difference Between Cocaine Base and Crack Cocaine

With respect to the last claim, the Magistrate Judge notes that for purposes of application of the federal criminal statutes and sentencing guidelines, crack cocaine and cocaine base are treated as the same substance. *See United States v. Sanchez*, 81 F.3d 9, 10 (1st Cir.), *cert. denied*, 137 L. Ed. 2d 137 (1996). This conclusion is clearly correct. Thus, even assuming the truth of the allegation, Defendant cannot demonstrate any prejudice from the conduct of counsel. Defendant cannot proceed on the merits of this claim. The Court will accept and affirm the Recommended Decision of the Magistrate Judge in this respect.

3. Attorney's Failure to Pursue Direct Appeal

With respect to the second claim made by Defendant, the Magistrate Judge concludes, on the basis of the Government's concession of deficient performance of defense counsel in pursuing the appeal, that Defendant is entitled to reinstatement of his appellate rights. This Court concurs with that conclusion and will accept and affirm the Magistrate Judge's Recommended Decision in that respect.

4. Attorney's Alleged Misadvice Concerning the Limits of Sentence

With respect to Defendant's first claim of ineffective assistance of counsel, the Magistrate Judge finds two bases to recommend its dismissal. They are that: (1) Defendant nowhere asserts "he would have entered into a different plea had he received more accurate advice from his attorney concerning the applicable sentence," Recommended Decision of the Magistrate Judge at 4; and (2) Defendant has made no "claims of innocence or the articulation of a plausible defense which could have been raised at trial," *id.*

Both of those reasons were entirely correct on the record before the Magistrate Judge at the time he made them. However, Defendant has, since the filing of the Recommended Decision, filed an objection thereto (Docket No. 27) in which he asserts for the first time "that he would have insisted on [probably] proceeding to trial had he not received the advice from Mr. McKenzie *(sic).*" (Bracketed material in the original.) Defendant's Objection at 4.

The Court passes for the nonce the questions of whether so untimely an assertion is to be countenanced when it was not put forth in the proceedings before the Magistrate Judge and whether the problematic nature of this assertion vitiates its reliability as a predicate for a showing of prejudice.

It suffices to note only two things in light of this assertion. First, Defendant still does not make any protestation of his innocence of the substantive offense charged against him, nor has he made any articulation of any viable defense to the cocaine charge that could be asserted at trial. This lacuna in the record, alone, is sufficient basis for dismissal of the claim without a hearing. *See United States v. Horne*, 987 F.2d 833, 835 (D.C. Cir.), *cert. denied*, 510 U.S. 852 (1993); *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir. 1990).

Second, passing the first ground of dismissal, the addition of this assertion to the record in this case does no more than place this case in the exact factual stance of that part of *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), relating to the identical claim of the defendant Dyer. The Court of Appeals for this circuit there said in respect to Dyer's claim:

> When, as in this case, a defendant has pleaded guilty to a charge, the prejudice prong of the test requires him to show that, but for his counsel's unprofessional errors, he probably would have insisted on his right to trial.

> . . . . In his brief, Dyer contends, *inter alia*, that his trial attorney assured him that his sentence would be no more than eighteen months, and that there was simply "no way" that he would be sentenced as a career offender pursuant to U.S.S.G. § 4B1.1. Even a generous reading of this claim leaves no doubt that Dyer failed adequately to allege any cognizable prejudice. An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test. Similarly, Dyer's self-serving statement that, but for his counsel's inadequate advice he would have pleaded not guilty, unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial, is insufficient to demonstrate the required prejudice.
>
> To add the finishing touch, the plea agreement that Dyer signed stated in so many words that he faced a maximum possible sentence of thirty years' imprisonment. The district court reinforced this warning during the plea colloquy, and explained to Dyer that his sentence could not be calculated with certitude until the probation office prepared the presentence investigation report. In response to questioning from the bench, Dyer acknowledged his understanding that even if he received a harsher-than-expected sentence, he would remain bound by his plea. And Dyer also assured the court that no one had made any promises to him anent the prospective length of his sentence. Thus, regardless of his counsel's performance, Dyer was well aware of the full extent of his possible sentence when he decided to forgo a trial and enter a guilty plea.
>
> Under the applicable constitutional standard, a failure of proof on either prong of the *Strickland* test defeats an ineffective-assistance-of-counsel claim. Since we find no cognizable prejudice, we need not determine what Dyer's trial attorney did or did not tell him, or whether the attorney lacked familiarity with the sentencing guidelines to such an extent as to render his performance constitutionally infirm.

Id. at 1413-14 (emphasis added and citations omitted).

The factual findings recited above in the *LaBonte* opinion are precisely the same as the factual predicate exhibited by the record here on the same points -- in fact, the undersigned is

the judge who conducted the Rule 11 inquiry and the sentencing proceedings in respect to the defendant, Dyer, in the *LaBonte* case. *LaBonte* controls the resolution of this case on this claim of ineffective assistance of counsel. The Court concludes that Defendant can make no showing of prejudice sufficient to satisfy the requirements of *Strickland* on this claim. Accordingly, the Court will accept and affirm the Recommended Decision of the Magistrate Judge on this claim.

This Court having made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision as indicated hereinabove, and concurring with the recommendations of the United States Magistrate Judge for the reasons set forth above and in the Recommended Decision, and having determined that no further proceeding is necessary; it is **ORDERED** as follows:

(1) The objection of the Defendant as to the Recommended Decision in respect to Criminal No. 96-29-P-C is hereby **DENIED**;

(2) The Recommended Decision of the Magistrate Judge in respect to Criminal No. 96-29-P-C is hereby **AFFIRMED**;

(3) Defendant's Motion to Vacate, Set Aside, or Correct his sentence is hereby **GRANTED** to the extent that it seeks to restore his appellate rights in Criminal No. 96-29-P-C and is otherwise **DENIED** with respect to Criminal No. 96-29-P-C without an evidentiary hearing.

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GENE CARTER
District Judge

Dated at Portland, Maine this 22nd day of December, 1997.

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